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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 154

TINKER & RASOR, JOHN PATRICK RASOR and LEO H. TINKER,

Petitioners

vs.

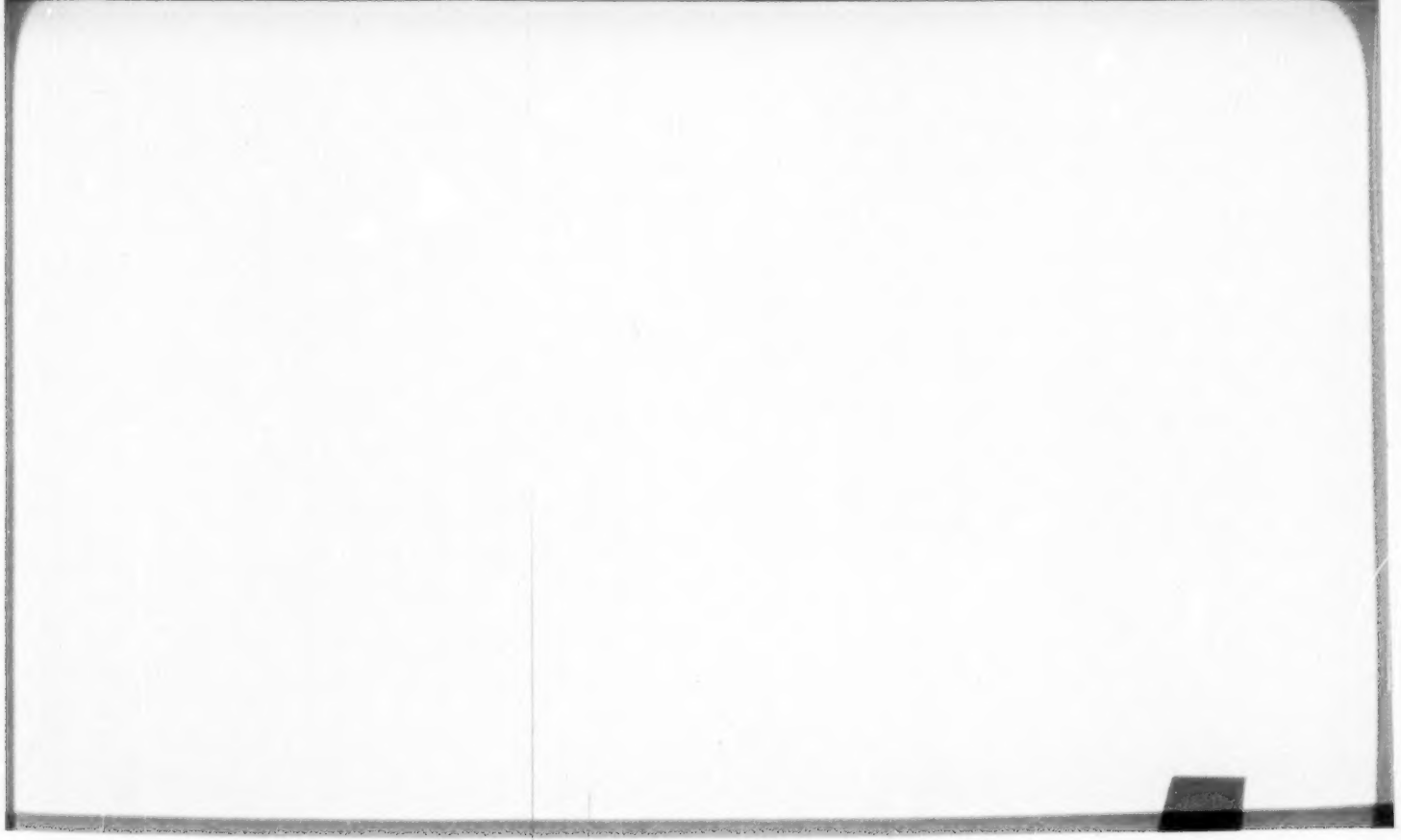
DICK E. STEARNS and THE D. E. STEARNS COMPANY,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

EDWARD B. GREGG
HENRY GIFFORD HARDY
2610 Russ Building
San Francisco 4, California
Attorneys for Petitioners

PARKER PRINTING COMPANY, 190 FIRST STREET, SAN FRANCISCO 8



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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petitioners, Tinker & Rasor, John Patrick Rasor and Leo H. Tinker, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The judgment of the Court of Appeals reverses the judgment of the District Court, which had held a patent invalid for lack of invention.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court (R. 18 to 25; also printed in Appendix, pages 1 to 6), is reported at 108 F. Supp. 237. The opinion of the Court of Appeals (R. 911-924) is printed in the Appendix, pages 7 to 22, and is reported at 220 F.2d 49.

JURISDICTION

The judgment of the Court of Appeals was entered on February 7, 1955 (R. 925; Appendix, page 23). A timely petition for rehearing was filed under the provisions of Rule 23 of the Rules of the Court of Appeals for the Ninth Circuit. This petition was denied on March 24, 1955 (R. 927; Appendix, page 24). The jurisdiction of this Court is invoked under U.S. Code Title 28, § 1254, subsection 1, the writ having been applied for within ninety days of the denial of the petition for rehearing.

QUESTIONS PRESENTED

1. Where a District Court has held a patent for a combination of old elements to be invalid for lack of invention on the authority of the most recent opinion of the United States Supreme Court on the subject of patentable invention, *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147, 95 L.Ed. 162 (hereinafter referred to as the *A & P Case*), and where the appeal has been briefed and argued primarily upon the holdings of that case, is it a maladministration and a denial of justice for the Court of Appeals to ignore that case completely and to reverse the District Court's judgment of invalidity exclusively on the basis of rules of law taken from prior, discredited cases and authorities which have been clearly overruled by the *A & P Case*?

2. In reversing the District Court's judgment of invalidity, did the Court of Appeals err as a matter of law in applying a prior and discredited test of patentability of a combination of old elements, namely, that the device is patentable if it operates "in a

more facile and efficient way" (R. 922; Appendix, page 20), rather than the approved test laid down by this Court in the *A & P Case*, namely, that the combination must exhibit "unusual or surprising consequences"? (340 U.S. 147, 152).

3. Did the Court of Appeals, in reversing the District Court's judgment of invalidity, err as a matter of law in applying a rule that nonanalogous prior art must not be considered on the question of invention in a combination of old elements (R. 922; Appendix, page 19), whereas in the *A & P Case* this Court considered nonanalogous prior art (so found by both lower courts) and held the patent invalid on the basis of such nonanalogous prior art? And does this ruling of the Court of Appeals for the Ninth Circuit also conflict with the ruling of the Court of Appeals for the Sixth Circuit in *Allied Wheel Products v. Rude*, 206 F.2d 752, 756?

4. Did the Court of Appeals err as a matter of law in interpreting "prior knowledge" within the meaning of 35 USC (1940 edition) § 31 [35 USC (1952 edition) § 102] as being a "prior reduction to practice" (R. 921; Appendix, page 18) rather than holding, as did this Court in *Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 324 U.S. 320, 326, that "prior knowledge" short of "reduction to practice" may be relevant to the question of invention?

STATUTE INVOLVED

The only statute involved is 35 USC (1940 ed., the former Title 35), § 31. That statute, insofar as it is pertinent here, has been re-enacted without any significant change as 35 USC § 102, enacted in 1952 and effective January 1, 1953. 35 USC (1940 edition) § 31 is set forth below.

> "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, or who has invented or discovered and asexually reproduced any distinct

and new variety of plant, other than a tuber-propagated plant, not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof, or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to this application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

STATEMENT OF THE CASE

This is a patent infringement case brought under 28 USC § 1338(a), in which the patent is admitted by respondents to be for a device which is a combination of old elements (R. 47, opening statement of Mr. Simms; also R. 476); in which the District Court, on the authority of the *A & P Case*, 340 U.S. 147, 95 L.Ed. 162, decided December 4, 1950, held the patent invalid for lack of invention; and in which the Court of Appeals reversed, holding that the patent is not invalid for lack of invention but without considering or even referring to the *A & P Case* in its opinion.

The latest case decided by this Court on the subject of patentable invention in a combination of old elements is the *A & P Case*.

After five days of trial, including testimony of several witnesses and demonstration of exhibits, the District Court filed its opinion (R. 18-25; Appendix, pages 1 to 6) holding the patent invalid for lack of invention on the authority of the *A & P Case*. The District Court held, granting that the patented combination is new and useful, nevertheless, the old elements or components of the patented combination do not cooperate in any unusual or unexpected way; that the combination fails to exceed the sum of its parts, as required by the *A & P Case*.

Findings of fact were filed pursuant to the opinion of the District Court, among them being findings with regard to prior

activities of one O. C. Mudd (Finding No. 14, R. 28-29), and with regard to Stevens Patent No. 951,347 (Finding No. 15, R. 29). A crucial or ultimate finding was made which is based squarely upon the *A & P Case* (Finding No. 25, R. 31) as follows:

> "(25) Such combination of old elements, if new, does not amount to patentable invention because the elements thereof do not cooperate in any new way or contribute any new or unexpected result."

The Court of Appeals reversed, holding the patent not to be invalid for lack of invention. The Court of Appeals disagreed with the District Court with regard to Findings Nos. 14 and 15 regarding the prior activities of O. C. Mudd and regarding the Stevens patent, respectively (R. 920-21 and R. 921-22; see also Appendix, pages 17 to 20). The Court of Appeals then held that, since the "subsidiary findings" (such as Findings Nos. 14 and 15) were not supported by evidence, the crucial Finding No. 25 quoted above could not be sustained (R. 922; also Appendix, page 20).

To reach this result the Court of Appeals had to rely upon three rules of law, each of which petitioners submit is erroneous and is in flagrant conflict with rules of law laid down in recent decisions of this Court, particularly the *A & P Case*. The three erroneous rules of law applied by the Court of Appeals, and the situations to which they were applied, are as follows:

(a) Regarding the Stevens patent, the Court of Appeals found as a fact that it is in a remote and nonanalogous art, and stated as a rule of law that nonanalogous art must not be considered by the trial court on the question of invention (R. 922; Appendix page 19). (Petitioners submit that this rule of law is clearly in conflict with the *A & P Case*, and that it is also in conflict with the Sixth Circuit, *Allied Wheel Products v. Rude*, 206 F.2d 752, 756.)

(b) Regarding the prior activities of O. C. Mudd, the Court of Appeals found as a fact that Mudd's prior activities were an experiment and not a "reduction to practice", and it stated as a rule of law that "prior knowledge" within the meaning of 35 USC (1940 ed.) § 31 [35 USC (1952 ed.) § 102] must be a "reduction to practice" (R. 920-21; Appendix, page 18). (Petitioners submit that this rule of law clearly conflicts with the ruling of this Court in *Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 324 U.S. 320, 89 L.Ed. 973).

(c) Regarding Finding No. 25 that the combination of old elements of the patented device does not "contribute any new or unexpected result", the Court of Appeals applied the legal test that a combination of old elements is patentable if it is "new and useful", and that it is "new and useful" if it operates in "a more facile and efficient way" (R. 923; Appendix, page 20). (Petitioners submit that this rule clearly conflicts with the *A & P Case*).

Another, and most unusual facet of the present case is the fact that, although the decision of the District Court was based upon the *A & P Case*, not one word is said in the opinion of the Court of Appeals with regard to the *A & P Case;* it is completely ignored; and the authorities relied upon by the Court of Appeals are all dated prior to and have clearly been overruled by the *A & P Case* as detailed hereinafter![1]

This unusual circumstance was pointed out to the Court of Appeals in Petitioner's petition for rehearing. In denying that petition, the Court of Appeals refused to explain or comment on its obvious failure to consider the *A & P Case*. Instead the Court of Appeals denied the petition for rehearing without comment, on a printed form (R. 927; Appendix, page 24).

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1. The only exceptions are *Pacific Contact Laboratories v. Solex*, 209 F.2d 529 (R. 920, Appendix, page 17); a case not in point as to the issues presented in this petition) and *Allied Wheel Products v. Rude*, 206 F.2d 752 (R. 922; Appendix, page 20; a Sixth Circuit case which is in conflict with the case at bar).

REASONS FOR GRANTING THE WRIT

1. This is not a case for application of the rule that concurrent findings of fact by two courts will not be disturbed. The opinions below are in direct conflict on important rules of law.

2. As a matter of orderly judicial administration, any appellate court has a duty to the parties, to the trial court and to the public to consider the cases and authorities relied upon by the trial court in its judgment and deemed by it to be controlling.

The District Court in this cause relied heavily upon the *A & P Case,* which is the latest decision (December, 1950) of the Supreme Court stating the rule for patentable invention in a combination of old elements, such as the alleged invention involved here. The cause was briefed and argued on appeal primarily on the basis of the *A & P Case.* Yet the Court of Appeals in its opinion completely ignored the *A & P Case* and relied upon prior, discredited authorities. (See Footnotes 2, 3, 5 and 6, infra.)

Ours is supposed to be a Government of laws, not of men, and our judicial system is supposed to be guided by precedent and not by the current whims of a court. But if courts are free to ignore controlling precedents, especially precedents laid down by this Court, then no counsel can predict and no party can expect a decision based upon precedent.

This is a patent case but the obvious denial of justice and flouting of precedent in this case, if not reversed, may lead, by the same process of judicial amnesia, to denial of justice in cases involving important Constitutional and political rights.

3. The *A & P Case,* decided in December, 1950, is the latest pronouncement of this Court upon the important question of the test of invention involving a combination of old elements. No case decided by this Court since that date has dealt with this question (or any other question regarding the standard of patentable invention), other than a brief per curiam opinion in *Crest*

Specialty v. Trager, 341 U.S. 912, 95 L.Ed. 1349, reversing a judgment of patent validity on the authority of the *A & P Case.* The question dealt with in the *A & P Case* is squarely presented here and was squarely decided on the basis of the *A & P Case* by the District Court. The opinion of the Court of Appeals recognizes that the alleged invention is for a combination of old elements (R. 916; Appendix, page 13) but refuses even to consider the *A & P Case.*

This Court in the *A & P Case* laid down a stricter test of invention for a combination of old elements than had been applied by the courts previously. The stricter test of the *A & P Case* is: It is not sufficient that a device produce "results more striking, perhaps, than in any previous utilization" (340 U.S. 153, 95 L.Ed. 167); but it is necessary that the device produce "unusual or surprising consequences" (340 U.S. 152, 95 L.Ed. 166).

In the case at bar, the Court of Appeals reversed the District Court on a point of law by the simple expedient of ignoring the *A & P Case,* and by applying the more lenient test of prior, discredited cases, namely, that the device operate "in a more facile and efficient way".[2] This very language is taken from cases decided prior to the *A & P Case* and is, in fact, substantially identical with language employed by the trial court in the *A & P Case!*[3] In *Brad-*

2. The pertinent portion of the Court of Appeals' Opinion is at R. 923, also Appendix, page 20. The cases cited in support of the "more facile and efficient" test are *Willard v. Union Tool Co.,* 253 Fed. 48, decided in 1918; *Long v. Dick,* 38 F. Supp. 214, decided in 1941; *Application of Ostermann,* 179 F.2d 1010, decided February 2, 1950; *Imperial Brass Mfg. Co. v. Bonney Forge,* 38 F. Supp. 829, decided in 1941. All these are prior to the *A & P Case!* The Court cites 69 C.J.S. § 68, page 303 and 40 Am. Jur. § 19, page 543. The latter is definitely, the former is probably prior to the *A & P Case* (copyright 1951).

3. One of the authorities cited by the Court of Appeals (R. 923) is 69 C.J.S. § 68, page 303, which applies the test, "it is sufficient if an old result is accomplished in a new and more facile, economical or effective way". This authority cites in support of the rule *Bradley v. Great Atlantic & Pac. Tea Co.,* 78 F. Supp. 388. That is the lower court case reversed by the Supreme Court in the *A & P Case!*

ley v. Great Atlantic & Pacific Tea Co., 78 F. Supp. 388, Judge Picard at page 391 used the language, "a more facile, economical and efficient way". He was reversed by this Court in the *A & P Case*. It is thus abundantly clear that the Court of Appeals in the case at bar applied the more lenient test of invention which was expressly overruled by the Supreme Court in the *A & P Case*.

If this result is not reversed, then the *A & P Case* must be considered as overruled in the Ninth Circuit.

4. By the same, simple expedient—ignoring the *A & P Case*—the Court of Appeals reversed the District Court on a point of law as to the relevance of an important item of prior art (Stevens Patent No. 951,347, R. 921-22). The Stevens patent (R. 775-77) shows one of the elements of the patented device, namely, a coiled spring, and as found by the District Court (Finding No. 15, R. 29), the patent teaches its mode of operation. Nevertheless, the Court of Appeals made its own, independent finding that the Stevens patent is in a remote and nonanalogous art, and concluded that for this reason and as a matter of law, "it [the Stevens patent] should not have been considered by the court below upon the question of invention" (R. 922; Appendix, page 19).

This point was urged upon the Court of Appeals in the briefs and arguments of respondents and, in reply, petitioners relied upon the *A & P Case*, in which this Court considered prior art which was expressly found by both lower courts to be nonanalogous.[4] This Court, in the *A & P Case*, nevertheless considered the nonanalogous prior art and held the patent to be invalid for lack of invention over nonanalogous prior art.

This point was completely and utterly ignored by the Court of

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4. See opinion of the Court of Appeals, 179 F.2d 636, at page 638 quoting the District Court's Finding No. 17, and at page 639 wherein the Court of Appeals held the prior patents relied upon by defendant to be "totally nonanalogous".

Appeals, which adhered to older cases and authorities decided prior to and overruled by the *A & P Case*.[5]

Again, if this result is not reversed, then in the Ninth Circuit the *A & P Case* must be considered as overruled. Also, the Ninth Circuit is clearly in conflict with the Sixth Circuit on the relevance of nonanalogous prior art. In the Sixth Circuit the rule is clearly stated in *Allied Wheel Products v. Rude* that nonanalogous prior art must be considered (206 F.2d at page 756).

5. The District Court attached weight and importance to prior activities of one O. C. Mudd (see opinion of District Court at R. 21, and Appendix, page 3; Finding No. 14, R. 28-29). There is no dispute about the facts. (See opinion of Court of Appeals at R. 920-921, also Appendix, page 17). Mudd experimented with one of the elements of the patented combination (a coiled spring) prior to the patentee's date of invention but did not "reduce it to practice" until later. The District Court held (R. 21, also Appendix, page 3; Finding No. 14, R. 28-29), that Mudd "knew" of the invention prior to the patentee within the meaning of 35 USC (1940 edition) § 31; [35 USC (1952 edition) § 102]. That statute provides that an invention is not patentable if it was "known" before the patentee's invention or discovery. The Court of Appeals reversed on the ground that, to be "known" within the meaning of this statute, an invention must have been "reduced to practice"; i.e., it must have been perfected (R. 921).

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5. The pertinent portion of the Court of Appeals' Opinion is at R. 922; also pages 19-20 of Appendix. Authorities cited are *General Metals v. Wellman*, 157 F.2d 505, decided in 1946; *Deer Co. v. U. S. Slicing Machine Co.*, 21 F.2d 812, decided in 1927; *Copeman Laboratories v. General Plastics*, 149 F.2d 962, decided in 1945; *Allied Wheel Products v. Rude*, 206 F.2d 752, 755, decided in 1953; and 69 C.J.S. § 53, page 266. 69 C.J.S. is probably dated prior to the *A & P Case* (Copyright 1951) and contains no reference to the *A & P Case*. *Allied Wheel v. Rude* is later than and considers the *A & P Case*, but arrives at a conclusion opposite to that of the Court of Appeals in the case at bar. The Court of Appeals for the Sixth Circuit held in *Allied v. Rude* that nonanalogous prior art must be considered (206 F.2d 756). All the other authorities cited are dated prior to the *A & P Case*.

This might be a reasonable interpretation of the statute had not this Court in *Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 324 U.S. 320, 326, 89 L.Ed. 973, 979 ruled otherwise. In that case this Court ruled that even an abandoned experiment may be significant to show lack of invention. Concerning a prior experiment relied upon by the defendant in that case, which the plaintiff attacked as an abandoned experiment, this Court said at 324 U.S. 326, 95 L.Ed. 979:

> "Even if petitioner be correct in labeling this Gypsy Oil Company use as an abandoned experiment not amounting to anticipation, it is significant that the use of an inhibitor to check the hydrochloric acid from corroding the metal well equipment while attacking the scale suggested itself without trouble."

That is, this Court clearly held that an "abandoned experiment" (which is not a "reduction to practice") may be relevant to the question of invention.

As if determined to thwart the rulings of this Court, the Court of Appeals again completely ignored this Court's latest pronouncement and again cited and relied upon prior and discredited authorities.[6]

If this result is not reversed, the Supreme Court's ruling on the relevance of prior knowledge short of reduction to practice in *Dow v. Halliburton,* must be considered as overruled in the Ninth Circuit.

6. The patent in suit, if construed as suggested in the opinion of the Court of Appeals, is of great importance in the vast pipe-

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6. Pertinent portion of the Court of Appeals' opinion is at R. 920-21; also Appendix, pages 17-18. The authorities cited are *Coffin v. Ogden,* 18 Wall. 120, decided in 1874; *Clark Thread Co. v. Willimantic Linen Co.,* 140 U.S. 481, decided in 1891; *Block v. Nathan etc. Co.,* 9 F.2d 311, decided in 1925; and *Harper v. Zimmerman,* 41 F.2d 261, decided in 1930. All these cases are prior to *Dow Chemical Co. v. Halliburton,* which was decided in 1945, and which is ignored by the Court of Appeals in the case at bar!

line industry. (Note the Court of Appeals' characterization of the patentee at R. 924; Appendix, page 21 as an 'innovator" and its reference at the same page to the "widespread acceptance" and "commercial success" of the patented device.) In the pipeline industry it is customary to inspect the protective coatings applied to pipelines by electrical means known as a "holiday detector". Today all holiday detectors employ a coiled spring element which serves as an "exploring electrode" to detect flaws and which is rolled along the pipe. The patentees, respondents herein, lay claim to any and all holiday detectors in which the electrode is a coiled spring and is rolled along the pipe.

If the decision of the Court of Appeals reversing the District Court is not itself reversed, respondents may monopolize a vital and critical branch of the pipeline industry. This monopoly is aggravated by the following facts: Respondents admit that they refuse to sell their equipment, and that they will not lease or sell component parts of their equipment (R. 166-67). They follow the unyielding policy of leasing rather than selling, and of leasing only complete machines of which the patented device is but a part (R. 166-67).

An odious and oppressive monopoly of unpatented materials will result unless the decision of the Court of Appeals is reversed.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD B. GREGG
HENRY GIFFORD HARDY
Attorneys for Petitioners

June 10, 1955.

CERTIFICATE OF SERVICE

Pursuant to Rule 33, the above and foregoing Petition for Writ of Certiorari and Appendix thereto, have been served by depositing the same in a United States Post Office, with first class Air Mail postage prepaid, addressed to H. Calvin White, Esquire, Counsel of Record for Respondents, at his Post Office address, 611 Wilshire Boulevard, Los Angeles 17, California, this 10th day of June, 1955.

Edward B. Lugg

Henry Gifford Hardy

Attorneys for Petitioners

JUN 15 1955
HAROLD B. WILLEY, Clerk

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APPENDIX ACCOMPANYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

EDWARD B. GREGG
HENRY GIFFORD HARDY
2610 Russ Building
San Francisco 4, California
Attorneys for Petitioners

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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OPINION OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

This case concerns a holiday detector. Holiday detectors are used in the installation of underground pipe. All pipe, regardless of its composition, is subject to ravages of time and the elements and must be replaced. Consequently, from the very beginning of the industry there have been sought ways and means to extend the life span of underground pipe. Within the past several decades steel has been used more and more for underground pipe lines, but steel is also subject to corrosion and decay. To retard corrosion pipe was coated with a tar-like substance, applied by hand with a brush. However, hand coating was not perfect.

Holes in pipe coating are called "holidays" in the pipe industry, and a holiday detector is an apparatus which detects or discovers the holes or defects in pipe coatings. When the coating consisted of a tar-like substance applied by hand, it was difficult to obtain a uniform surface, and any apparatus used to detect defects often became contaminated with the coating substance. Under such conditions detecting holidays was a very precarious and unsatisfactory procedure. Methods were constantly being sought by the industry to improve (1) the means by which pipe was coated or covered and (2) detection of holidays.

One great advancement in the protection of pipe was to wrap it with paper after coating, and machines were designed whereby the pipe was coated with a rust-retarding substance and then immediately wrapped with strong paper. The paper served to accentuate the holiday problem, as it covered the holidays so that they were no longer visible to the naked eye. Search went on apace to discover methods to ascertain holidays beneath the paper wrapping.

Early in the industry it was discovered holidays could best be detected by an electric spark, and one of the first holiday detectors was nothing more than a muslin bandage dipped in a salt solution

and connected with a battery. This rag was passed beneath the pipe by the operator (the ends being held in both hands) and moved along the pipe, as shown in plaintiffs' Exhibit 28 in this case. In a very inefficient manner this apparatus did disclose the holidays but obviously was not a satisfactory solution to the problem; and investigation was continued by the industry as a whole to develop some apparatus which would bring about a reasonable solution to the problem.

From the muslin rag it was only a step to an electrode which was connected to a battery or coil and used by hand, being passed along the pipe by the operator. Originally the electrical apparatus was carried by the operator [plaintiff's Exhibit 10] or placed on the ground.

It was necessary to take only one additional step to transfer the electric apparatus to a cart which was pulled along the pipe [plaintiff's Exhibit 51]. Someone then decided that instead of having the cart pulled along the pipe, it would be feasible to provide a small cart, or platform with wheels attached to it, and use the pipe as the roadway [defendant's Exhibit Q]. Holiday detectors at the present time uniformly use this procedure—the electric apparatus is placed upon a small platform to which are attached wheels, and the platform is pushed or pulled along the pipe itself in search of holidays.

Transfer of the electrical apparatus from the operator's shoulders to the pipe developed in an orderly fashion, and so far as we have been able to ascertain no one has contended that it was invention to transfer the apparatus from the shoulders of the operator to a truck or from the truck to the pipe itself.

In the case at bar plaintiff admits the platform upon which the electrical apparatus is installed is old in the art and claims no invention therefor.

At the same time the electrical part of the holiday detector was

being transferred from the operator's shoulders to the pipe, improvements were constantly being made with reference to the electrode. The so-called rag or cloth detector, plaintiff's Exhibit 28, was a very inefficient apparatus. However, it did establish the fact that holidays could be detected by an electric spark.

The next step in developing the electrode was the half-circle, to which wire brushes or minute wires were attached. This, too, was a manually operated electrode, being passed up and down the pipe by the operator while in use. It was only one step from the half-circle to the full-circle electrode. Plaintiff's Exhibits 30A and 30B depict the full-circle, brush electrode.

It was found the brush or wire electrode was not entirely satisfactory, inasmuch as the wires or brushes had a tendency to wear out, and it was impossible to keep the electrode while in use equidistant from the pipe at all times. In the trial and error method of attempting to find a more satisfactory electrode, the use of a steel band was tried and, finally, a coil spring.

Defendant's Exhibit DD discloses one of the first spring electrodes in use. It will be noted the spring electrode was attached to a circular band of steel by chains and rings. This electrode did not prove entirely satisfactory, as it had to be dragged along the pipe, and there was a tendency to pull the electrode away from the pipe. Although the spring electrode could turn or rotate, because of its connection to the circular band and the pull of the operator its rotation was impeded. Since it had been demonstrated the pipe could be used as a roadway for the platform, someone conceived the idea of placing the spring electrode around the pipe itself, and, when pushed by the operator, it could be made to rotate or revolve.

Plaintiff Stearns combines both of these developments to make his holiday detector, for which he claims an exclusive right. In plaintiff's detector there is a rigid arm, extending from the plat-

form, which contacts the electrode and when the platform is pushed either forward or backward, this rigid arm in contact with the electrode causes the spring electrode to revolve. Plaintiff's Exhibit 15 is a picture of plaintiff's electrode and detector. Plaintiff does not claim he has a patent on the spring electrode. In fact, he admits that all of the elements of his electrode are old in the art but contends that he has taken certain elements old in the art and has combined them so as to achieve a new result. Although plaintiff claims he was the first to determine that a spring electrode would roll along a pipe, nevertheless, prior patents indicate he was not the first inventor.

In 1910 the United States Patent Office granted letters patent to George E. Stevens for an electric snap switch. In that patent it was disclosed there was a circular spring which was caused to rotate along a cylindrical body and, when in place, the spring itself was the connection between the negative and positive wires of the switch. It is true that in the Stevens Patent the coil springs were not used in the same manner as employed by plaintiff, but it was indicated that the coil spring could be made to rotate or roll along a cylinder and used as an electrical connection.

It is claimed that although all elements of the Stearns detector are old in the art, there is a new combination which produced a new or beneficial result. The result to be attained is the detection of holidays, and from the very beginning of the art the apparatuses have been doing just that. It may be that the Stearns apparatus is a more efficient detector—that it accomplishes better results—but it can hardly be said that it accomplishes new results.

As pointed out by Mr. Justice Douglas in A. & P. Tea Co. vs. Supermarket Corp., 340 U.S. 147 at 154, the Framers of the Constitution did not want monopolies freely granted. Every patent is the grant of a privilege of exacting tolls from the public, and the invention to justify a patent

"had to serve the ends of science—to push back the frontiers of chemistry, physics, and the like; to make a distinctive contribution to scientific knowledge."

Or, as said in Gomez vs. Granat Bros., 177 F. 2d 266 at 268:

The invention "must reveal the flash of creative genius not merely the skill of the calling."

Mr. Justice Jackson, writing the opinion in A. & P. Tea Co. vs. Supermarket Corp., supra, points out that:

"* * * The conjunction or concert of known elements must contribute something; only when the whole in some way exceeds the sum of its parts is the accumulation of old devices patentable. * * *

"* * *.

"Courts should scrutinize conbination patent claims with a care proportioned to the difficulty and improbability of finding invention in an assembly of old elements. The function of a patent is to add to the sum of useful knowledge. Patents cannot be sustained when, on the contrary, their effect is to subtract from former resources freely available to skilled artisans. A patent for a combination which only unites old elements with no change in their respective functions, such as is presented here, obviously withdraws what already is known into the field of its monopoly and diminishes the resources available to skillful men. This patentee has added nothing to the total stock of knowledge, but has merely brought together segments of prior art and claims them in congregation as a monopoly."

Plaintiff in the case at bar points to his commercial success and contends that because his detector has filled a long-felt want it is patentable, but again the Supreme Court in the A. & P. Tea Co. vs. Supermarket Corp. case, supra, says:

"The Court of Appeals and the respondent both lean heavily on evidence that this device filled a long-felt want

and has enjoyed commercial success. But commercial success without invention will not make patentability."

It is admitted by plaintiff herein that every element claimed was known to prior art; and although plaintiff's device may be a great improvement over the former prior art, we feel, nevertheless, that it is improvement and not invention.

Under the authority of A. & P Tea Co. vs. Supermarket Corp., supra, which was decided in December, 1950, and is one of the latest pronouncements of the Supreme Court on this very difficult subject, we shall have to find that plaintiff's detector does not reach the dignity of invention.

Judgment will be rendered in favor of defendant herein, and defendant shall prepare Findings of Fact, Conclusions of Law, and Judgment to be presented to the Court on or before the 21st day of July, 1952.

Dated this 2nd day of July, 1952.

/s/ HARRY C. WESTOVER,
District Judge

[Endorsed]: Filed July 2, 1952.

United States Court of Appeals
For the Ninth Circuit

Dick E. Stearns and The D. E. Stearns Company, a partnership composed of Dick E. Stearns and Ellen Belson Stearns, Appellants, vs. Tinker & Rasor, a corporation; John Patrick Rasor and Leo H. Tinker, Appellees.	No. 13,634 Feb. 7, 1955

OPINION

Appeal from the United States District Court,
Southern District of California,
Central Division

Before: STEPHENS and CHAMBERS, Circuit Judges; and WALSH, District Judge

WALSH, District Judge

Appellants sued appellees in the United States Court, Southern District of California, Central Division, charging by their Second Amended Complaint that appellees had infringed claims 1 and 7 of United States Letters Patent No. 2,332,182[1] (hereinafter "the

1. The patent was issued to Dick E. Stearns on October 19, 1943, on application filed August 23, 1941. The Second Amended Complaint alleged that The D. E. Stearns Company acquired title to the patent effective January 1, 1950, and owned the patent at the time the Second Amended Complaint was filed.

Stearns patent"), and praying for an injunction, an accounting, and damages. Appellees, by answer, raised the defenses that: the claims in suit were invalid for want of invention and because they do not particularly point out and dinstinctly claim the invention; the claims in suit were not infringed by appellees; and appellants were barred or estopped from obtaining any relief because of their misuse of the Stearns patent by employing it to exercise a monopoly over unpatented materials. Appellees also filed a counterclaim against appellants predicated upon the affirmative allegations of their answer and praying for (a) a declaratory judgment that the claims in suit were invalid and that appellees had not infringed said claims; (b) an injunction restraining appellants from acts of unfair competition and from asserting the Stearns patent against appellees and their customers; and (c) a judgment against appellants for damages occasioned appellees by appellants' misuse of the Stearns patent. Appellants made answer to the counterclaim and, upon the issues formed by the pleadings outlined above, the cause proceeded to trial before the court sitting without a jury.

Following the trial, the court below filed a memorandum opinion[2] and, thereafter, made and filed Findings of Fact and Conclusions of Law. Having concluded as a matter of law that claims 1 and 7 of the Stearns patent were invalid for want of invention over the prior art and that, accordingly, appellants' Second Amended Complaint should be dismissed, the court entered its judgment dismissing the Second Amended Complaint upon the merits. No findings or conclusions were made upon the issues of invalidity of the claims because of failure to particularly point out and distinctly claim the invention, or infringement, or misuse of the patent; nor was any judgment entered on the counterclaim and the answer thereto. The appeal here is by

2. 108 F. Supp. 237.

appellants from the judgment dismissing the Second Amended Complaint.

The Stearns patent is for an "Insulation Testing Device" and is in the field of what are styled "holiday detectors", devices to detect flaws or "holidays" in the coal tar or asphalt enamel coatings which are applied to steel pipelines prior to their burial in the ground. The need for holiday detectors had its origin in the pipeline industry devoted to the transportation of petroleum products. The tremendous investment in the miles of steel pipe utilized in the industry, buried in the ground, and the fact that the pipe, if unprotected, is subject to rapid deterioration by rusting or electrolysis, dictated that every feasible step be taken to protect the pipelines and thereby lengthen their life span. Therefore, at a comparatively early date in the development of the industry, there came into use the practice of coating the pipe, before it was interred, to safeguard it against corrosion. Originally, the coating was applied by hand and imperfectly, with the result that there were "pin holes", "thin spots", and other flaws or breaks—all called "holidays"—in the coating. Holidays would, of course, permit corrosion and, ultimately, leakage at their points of location. Thus was the industry led into efforts toward and a search for improved means of protectively coating pipelines and means of detecting flaws in the coating so that they might be repaired before the pipeline was placed underground. The efforts and the search continued for years, in both directions. Means of protectively coating the pipelines have been improved; but holidays still occur and hence there is still need for detectors. Detectors, too, were discovered and improved, and out of the history of these devices this case arises.

In the matter of holiday detection, visual inspection of the coatings was at first relied upon to detect the flaws, but with highly unsatisfactory results. Then, because the organic material used for coating the pipe is, if sound, a poor conductor of elec-

tricity, while a flaw or holiday therein is, relatively speaking, a good conductor of electricity, the possibility of making an electrical inspection of the coated pipe was hit upon. In 1931, there was devised one of the first hodilay detectors which made an electrical inspection of pipe coatings. It was a cloth saturated in a brine solution to conduct electricity and connected to the terminals of a battery to supply electric current. The cloth was slung underneath the pipe[3] and cords attached to its ends were held by a man standing atop the pipe. As the man walked along the pipe, the cloth was moved along the pipe also; and as the cloth passed over a holiday, the passage of electricity from the cloth electrode through the holiday was registered upon a meter carried by the man and connected to the battery and the cloth electrode. This primitive holiday detector did disclose holidays better than was possible by visual inspection, but it was still very inefficient and efforts to improve the device and its several parts thenceforth engaged the attention and the efforts of the industry. Over the years, improvements and advancements were made in holiday detectors and in the elements which make up such detectors; but one of the large questions in this case is the precise point which had been reached by these improvements and advancements at the time of the advent of the Stearns holiday detector in early 1941.

There is in the record no substantial dispute between the parties as to a great deal of the history of holiday detectors during the decade between the birth of the "brine-soaked cloth plus battery" device and the completion of the Stearns invention. As to the electrode, the first step after the brine-soaked cloth was wire brushes or minute wires[4] attached to a metal frame semi-circular in shape. A handle to be held by the operator was attached to one end

3. The cloth was what has come to be known as an "exploring electrode", so named because it is an electrode which, in motion along a pipe, "explores" the pipe coating electrically for holidays.

4. These are called "brush type" electrodes.

of the semi-circular frame, and inspection of the pipe was made by the operator's passing the electrode along the length of the pipe. Since each such passage of the electrode covered but one-half of the circumference of the pipe, it was necessary, in order to cover the entire circumference, to pass the electrode over the pipe twice. Next came the full circle brush type electrode, constructed by putting together two half-circle brush type electrodes, joined by a hinge at the ends opposite from those to which the handles were attached. During the years under consideration, the brush type electrodes were the most widely used but other types also came into use. One was a copper ring set in a circular steel band but insulated from the band by a ring of reinforced resin. O. C. Mudd built a full circle electrode by joining the ends of a coiled spring. Mudd's electrode was attached by links and chains to a circular steel frame and was moved over the pipe surface by dragging it.

Developments in electrodes were paralleled by developments in other elements of detectors. One aspect of those developments which is pertinent here relates to the manner in which the electrical apparatus supplying current to the electrode was rendered mobile. Originally, such apparatus sat on the ground and was moved forward as the electrode progressed to the limit permitted by its connection to the electrical apparatus. Next, the apparatus was carried by the operator or someone assisting him. Then, the apparatus was placed in a cart or other vehicle and pulled along beside the pipe. Finally, the apparatus was set into a small platform which had wheels attached to it, and the whole arrangement was placed on top of the pipe to be moved by pushing or pulling it along the pipe as a roadway.

In 1934, R. A. Brannon built and used a holiday detector which integrated the platform on wheels to move atop the pipe carrying the electrical apparatus and a full circle brush type electrode. The circular frame of the electrode was rigidly joined by a piece of

pipe to the platform containing the electrical apparatus, and as the platform was pushed or pulled the electrode moved also.

Turning again to the electrodes described above, it is not disputed that they had serious shortcomings. The brush type electrodes tended to wear out rapidly. Those attached to frames could not be held steadily at the proper uniform distance from the pipe coating, either because of inability to keep the frame concentrical with the pipe as the frame was in motion or because of variations in the diameter of the pipe. The Mudd coiled spring electrode above described, designed to be dragged along the pipe, tended to separate from the pipe as the "pull" at its several points of connection to the rigid frame became unequal.

The claims of the Stearns patent in suit are for a combination of (1) a platform or carriage on wheels intended to roll along the pipe and to carry the electrical apparatus; (2) an electrode in the form of a coiled spring having its ends secured together to embrace the coated pipe to be tested; and (3) a pusher and contactor, carried by and electrically insulated from the platform, to provide mechanical and electrical connections between the spring electrode and the platform such that the movement of the platform along the pipe will cause a rolling movement of the spring electrode along the pipe.[5] From what has been said hereinbefore of the

5. Claims 1 and 7 read as follows:

"1. An electrical exploring device for detecting defects in an insulating coating on an elongated member which comprises an exploring electrode in the form of a coiled spring adapted to extend about such member and having its ends secured together to completely embrace such member, and means rotatably engaging and forming a movable electrical contact with said spring at a position remote from the surface of said member for connecting said spring to a high voltage testing circuit and for rolling said spring along such elongated member.

"7. In a device of the character described, a carriage comprising a platform on wheels, an exploring electrode in the form of a flexible elongated member of circular cross section and of an electrically conductive material adapted to embrace such member adjacent said carriage, and an electrode pusher and contactor carried by and electrically insulated from said platform and having parts in electrical and mechanical contact with said electrode whereby movement of

history of the holiday detector art, a reading of these claims raises the inquiry whether the Stearns patent is for a combination of old elements; and, indeed, appellants concede that the elements are old. But appellants took the position upon the trial, and they do here, that the elements in the Stearns combination cooperate differently therein than they did in prior detectors and that new and unusual results are produced by the combination. They point out, as the keystone of a different cooperation of the elements, that in the new combination the coiled spring electrode is detached from any frame, is supported only by the pipe, and, most importantly, it rolls as it inspects the coated pipe. The results are, they say, that the electrode at all times completely embraces the coated pipe in operation so that no part of the coating will be skipped, the electrode is always free in operation to change its form to conform to changes in the contour of the pipe, and the electrode rolls so readily and easily that by the very nature of its movement it will not pull away from the coating.

The court below found that prior to the invention of the Stearns patent, and apart from the coiled spring electrode of Mudd described above, holiday detectors employing an electrode formed by a coiled spring encircling the pipe to be tested with its ends joined together were openly and commercially used and/or sold in the United States by Alonzo L. Smith and by David Harrell,

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said carriage longitudinally along a member to be tested will cause a rolling movement of said electrode along such member."

The Stearns holiday detector may be described, with visualization and not technical accuracy in mind, as follows: The platform or carriage on wheels containing the electrical apparatus; is placed atop the pipe to be tested. The coiled spring electrode completely encircling the pipe with its ends joined together is placed immediately in front of the carriage. Projected from the front of the carriage is a rigid arm with its end in the shape of an inverted "U" which fits over the upper portion of the coiled spring electrode. As the carriage is pushed or pulled, either forward or backward, the propelling pressure thereby transmitted to the coiled spring electrode causes it to roll along the pipe.

Sr., and his employer Houston Pipeline Co.; that the rolling property of a coiled spring electrode and the advantages of such property in holiday detection was known prior to the invention of the Stearns patent to O. C. Mudd, to his associates, and to his employer Shell Pipeline Co.; that the practical advantages of a rolling coiled spring electrode and the fact that such a spring could be made to roll along a cylinder and be used as an electrical connection were described and clearly taught by the Stevens patent,[6] which was much earlier than Stearns' and which was not considered by the Patent Office during the prosecution of Stearns' application; and that the practical advantages of a rolling coiled spring electrode were put into open and commercial use in the United States prior to the invention of the Stearns patent by Alonzo L. Smith, by purchasers of Smith's holiday detectors, and by Harrell's employer. These subsidiary findings might, if they are supported by the evidence, render unassailable the further finding of the trial court (insofar as it may be said to be actually a finding of fact) that the "combination of old elements * * * does not amount to patentable invention because the elements thereof do not cooperate in any new way or contribute any new and unexpected result". Consequently, we examine the evidence to determine whether or not the subsidiary findings are supported thereby.

ALONZO L. SMITH. This witness, whose deposition was placed in evidence by appellees, testified that prior to 1941 he manufactured, tested and sold many holiday detector electrodes which were coiled springs encircling the pipe to be tested with their ends joined together and which rolled as they were pushed along the pipe. He testified that he made up and tested the first of these electrodes in late 1938 or early 1939. He stated that some photographs put in evidence as exhiibts depicted electrodes such as those he manufactured and sold prior to 1941, and he identified

6. United States Patent No. 951,347, granted March 8, 1910, to G. E. Stevens.

an electrode which was received in evidence as one of the first made by him. He explained that an exhibit consisting of a photostatic copy of an invoice dated September 16, 1939, and containing the language "2 16" Pipe Electrodes (Special Full Circle) for Holiday Detector" related to a coiled spring electrode intended to encircle the pipe to be tested.

Smith testified, also, that a great deal of the work connected with his first coiled spring electrodes was done at Pielop's machine shop, in Houston, Texas, and that one George Aschenbeck was employed in this work. But Aschenbeck, whose deposition was also introduced by appellees, testified that he did not enter into Pielop's employ until after he had left the farm on June 28, 1940,[7] a date from one to two years subsequent to the time when Smith said he recalled Ashenbeck's working on the electrodes. Further, Aschenbeck stated that it was a considerable length of time after he went to work for Pielop—he would guess five or six months but would be afraid to say just how long it was—before he knew of a coiled spring electrode.

The evidence just summarized is not sufficient to support the finding by the trial court that before the date of Stearns' invention Smith commercially used and sold a coiled spring electrode encircling the pipe to be tested with its ends joined together and that Smith and purchasers of his detectors put into open and commercial use the practical advantages of a rolling coiled spring electrode. There is no evidence to support the finding except Smith's own oral statement as to events and circumstances long past. Smith's testimony was not given in the presence of the trial court, hence there is no possibility of its having been accorded added weight by the trial court because of his having personally observed and heard the witness while testifying. The exhibits cannot be said to corroborate Smith in any real sense. The exist-

7. Aschenbeck is corroborated by his Social Security card which is dated July 15, 1940.

ence before 1941 of the electrode introduced as a physical exhibit and the electrodes depicted in the photographs is proved only if Smith's oral testimony is accepted. The invoice does not speak of a coiled spring electrode, and it can be found to relate to one only if Smith's oral testimony is accepted. Finally, Smith is contradicted in the most vital part of his story by Aschenbeck. There simply is not here the degree of proof which will sustain a finding of prior public use. *Paraffine Companies, Inc. v. McEverlast, Inc.*, 9 Cir., 84 F.2d 335, 339; *Rown v. Brake Testing Equipment Corp.*, 9 Cir., 38 F.2d 220, 223.

DAVID HARRELL, SR. This witness, whose deposition was placed in evidence by appellants, testified regarding his work in the year 1939 with two types of coiled spring electrodes for holiday detectors. In the first type, a coiled spring was threaded through a number of contact rings which were attached to a rigid circular frame. The coiled spring encircled the pipe to be tested with its ends joined together. Harrell testified that as the frame and the electrode were pushed or pulled along the pipe, the coiled spring rolled, but the rolling actually had a deleterious effect because the spring was imparted a circular motion around the pipe, which caused the spring to "hang up" in the contact rings. He said, also, that it was found impossible to adjust the tension on the spring so that it would not drag in places and thus bite into the pipe coating. He testified that this type electrode was never used in the field but only experimentally in the plant; and that the experimental use of the coiled spring did not continue for any length of time but was discarded in favor of a wire screen electrode. He characterized his work on the coiled spring electrode as an "unsuccessful attempt to apply a coiled spring to the operation".

As to the second of his coiled spring electrodes, Harrell described it as a coiled spring threaded over two semicircular pieces of welding rod, ends of the respective pieces of rod being joined

by a hinge at one point. The ends of the coiled spring were not joined in this electrode, and a gap of several inches between the ends of the spring occurred at the point where the unhinged ends of the welding rod frame approximated each other. Harrell said that this type of spring electrode was actually used in the field on a mile or two of pipe and that it rolled as it was pushed or pulled along the pipe; but again the circular motion imparted to the spring as it rolled caused it to "hang up" at the hinged portion and at the unjoined ends of the frame, with the result that "skipped spots" occurred in the inspection of the pipe. Harrell mentioned other unsatisfactory features of the electrode but perhaps its story is best summed up in his statements that "it was very unsatisfactory"; "It was discarded" in favor of the wire screen electrode; "That spring * * * didn't work, it was no good"; and "We didn't use this thing long, we threw it away".

The foregoing does not support the finding that Harrell and his employer, before Stearns, openly and commercially used a coiled spring electrode encircling the pipe to be tested with its ends joined together and that Harrell's employer put into open and commercial use the practical advantages of a rolling coiled spring electrode. The evidence does not show use, commercial or otherwise, but shows only unsuccessful experiments; and such experiments cannot anticipate or negative invention. *Coffin v. Ogden,* 18 Wall. 120, 124; *Smith v. Snow,* 294 U.S. 1, 17; *Pacific Contact Laboratories, Inc. v. Solex Laboratories, Inc.,* 9 Cir., 209 F.2d 529, 532; *Paraffine Companies, Inc. v. McEverlast, supra; Picard v. United Aircraft Corp.,* 2 Cir., 128 F.2d 632, 635; *Oswego Falls Corp. v. American Seal-Kap Corp.,* D.C. E.D. N.Y., 65 F. Supp. 338, 355.

O. C. MUDD. It was not contended by appellees, and the court below did not find, that Mudd or the Shell Pipeline Co. ever used a rolling coiled spring electrode commercially before Stearns. However, the depositions of Mudd and two of his associates with

Shell Pipeline Co. were put into evidence by appellees and the testimony was that, in 1940, in working with Mudd's *nonrolling* coiled spring electrode which has been described hereinbefore, they found that when the coiled spring with its ends fastened together was placed about a roll of roofing paper it rolled easily with a moderate amount of applied force. No experiments were made with the spring as a rolling electrode at that time, the witness Mudd explained, because Shell's pipe coating process then in use left protrusions of the coating material adhering to the pipe and a rolling coiled spring could not apply enough force to remove them. In early 1942, the witnesses testified, Shell for the first time wrapped its pipe with paper and Mudd and his associates used a rolling spring electrode as a holiday detector on that job.

All that can be made of this testimony is that, in 1940, Mudd and his associates found out that a coiled spring encircling a cylindrical body with its ends joined together would roll easily if it were pushed with a moderate amount of force and they *believed* that a rolling coiled spring could be utilized as an electrode in a holiday detector if it were tried. Though the witnesses gave reasons for not doing so, the fact is that they never used, or even tried to use, a rolling spring as an electrode, until after Stearns had made application for a patent. Mere belief, or even confidence, that a device will work if it is constructed and tried is not enough to bring into operation the statute[8] which renders unpatentable an invention "known * * * by others in this country" before the invention thereof by the applicant for a patent. An invention is "known" as that word is used in the statute, when it is "reduced to practice". It follows here, on the same principle, that Mudd and his associates and his employer cannot be found to have "known" the practical advantages of a rolling

8. 35 U.S.C. Sec. 102; 35 U.S.C. 1940 ed., Sec. 31; (Revised Statutes, Sec. 4886).

spring as an electrode before they ever rolled a spring for that purpose. *Coffin v. Ogden,* supra; *Clark Thread Co. v. Willimantic Linen Co.,* 140 U.S. 481, 489; *Block v. Nathan Anklet Support Co.,* 2 Cir., 9 F.2d 311, 312; *Harper v. Zimmerman,* D.C. Del., 41 F.2d 261, 267.

THE STEVENS PATENT. This patent, a copy of which was placed in evidence by appellees, is for an electric snap-switch, and proposes the utilization of a rolling coiled spring in its operation.[9] The intended use of the spring may be described roughly as follows: The spring encircles a stationary spindle-shaped member which has electrical circuit terminal contacts on opposite sides at one of its ends. A carrier (means to push the spring) is fastened to a push rod and when the rod is pushed the carrier forces the spring over the bilge (greatest diameter) of the spindle. This expands the spring and puts it under greater tension, so that the instant the bilge is passed the contractile energy of the spring is added to the thrust of the rod and snaps the spring onward to the end of the spindle, where it closes the circuit between the two contacts.

It is our view that the Stevens patent is in an art so remote and nonanalogous from that of the Stearns patent that it should not have been considered by the court below upon the question of invention and, consequently, that the court below should not have made the finding which it did upon the basis of the evidence regarding the Stevens patent. To us, it seems not reasonable to hold that an inventor working in the field of holiday detectors would naturally have looked to the art of snap-switches for help. *General Metals Powder Co. v. S. K. Wellman Co.,* 6 Cir., 157 F.2d 505, 510. The rule laid down by many of the authorities is that whether arts or uses are analogous depends upon the similarity of their elements and purposes. It is said that if the elements and

9. There is no evidence in the record that the patent was ever actually made or commercialized.

purposes in one art are related and similar to those in another art, and because and by reason of that relation and similarity make an appeal to the mind of a person having mechanical skill and knowledge of the purposes of the other art, then such arts must be said to be analogous; and, if the converse is true, they are nonanalogous arts. *A. J. Deer Co., Inc. v. U. S. Slicing Machine Co.*, 7 Cir., 21 F.2d 812, 813; *Copeman Laboratories Co. v. General Plastics Corp.*, 7 Cir., 149 F.2d 962; *Allied Wheel Products v. Rude*, 6 Cir., 206 F.2d 752, 755; 69 C.J.S., Sec. 53, p. 266. Even if we assume here a relation and similarity of elements in holiday detectors and snap-switches, the purpose of the snap-switch art, i.e., to open and close an electric circuit, has no relation or similarity to the purpose of the art of holiday detection, i.e., to determine the condition of pipe coating by subjecting it to electrical inspection.

Without the support of the subsidiary findings which we hold are clearly erroneous, the finding of the court below that the combination of old elements in the Stearns patent does not amount to patentable invention because the elements thereof do not cooperate in any new way or contribute any new and unexpected result must also fall. The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings. As we have determined, the spring electrode for the first time in its use in holiday detectors is rolled, instead of being dragged. In the Stearns detector, the pusher rotably engages and forms a movable electrical contact with the spring electrode so as to roll it and connect it electrically to the high voltage test circuit; and movement of the carriage longitudinally upon the pipe imparts a rolling movement to the spring electrode. And this different coaction of the elements produces a new and useful result, viz: The detection of holidays in a more facile and efficient way.[10] *Willard v. Union Tool Co.*,

10. In its memorandum opinion the trial court recognized Stearns detector as "a great improvement" and "a more efficient detector" which accomplishes better results.

9 Cir., 253 Fed. 48, 54; *Long v. Dick*, D.C. Cal., 38 F. Supp. 214, 220; *Application of Ostermann*, C.C.P.A., 179 F.2d 1010, 1014; *Imperial Brass Mfg. Co. v. Bonney Forge and Tool Works, Inc.*, D.C. Penna., 38 F. Supp. 829, 830; 69 C.J.S., Sec. 68, p. 303; 40 Am. Jur., Sec. 19, p. 543.

One additional finding made by the trial court remains to be considered. It reads: "The act of combining the said old elements to produce the combination of said Letters Patent, does not rise to the dignity of invention because it does not, in view of the state of the art as shown by the exhibits thereof and the explanation and analysis thereof by plaintiffs' and defendants' witnesses, represent anything more than the skill of the art or calling". It is evident that this finding (insofar as it may be said to be actually a finding of fact) is also bottomed upon the trial court's erroneous inclusion in the prior art of the Stevens patent, the Smith and Harrell rolling spring electrodes, and Mudd's claimed knowledge of the practical advantages of a rolling spring electrode. It is, therefore, also clearly erroneous.

As we pointed out earlier, before Stearns there was a decade long search in the industry for an electrode which would be free of the shortcomings and deficiencies of those then in use. In the search, Mudd and Harrell, the latter particularly, were close to doing what Stearns ultimately did. But though they were outstanding workers in the holiday detector field, they failed to solve the problem because their detectors, like all others theretofore devised, employed a frame which supported the contact elements in such manner that the frame could and did pull part of the contact elements away from the pipe coating. Stearns solved the problem, basically, by abandoning the frame and using the pipe alone to support the electrode. Stearns was an innovator, not a follower. *Sinclair & Carroll Co., Inc. v. Interchemical Corp.*, 325 U.S. 327, 330; *Pointer v. Six Wheel Corp.*, 9 Cir., 177 F.2d 153, 161. In addition, the record establishes beyond question ready

and widespread acceptance of Stearns' detector on the market and its attendant commercial success. We have here, then, a patent for an improvement which fills a long felt need, which those schooled in the art had not been able to devise before the patentee, and which meets with acceptance in the market. When these indicia of invention are taken into account together with the true state of the prior art and what Stearns actually did to improve the art, it must be concluded that the Stearns patent is not invalid for want of invention. *Expanded Metal Co. v. Bradford,* 214 U.S. 366, 381; *Eibel Process Co. v. Minnesota & Ontario Paper Co.,* 261 U.S. 45, 56; *Johnson Company Inc. v. Philad Co.,* 9 Cir., 96 F.2d 442, 444; *Research Products Co. v. Tretolite Co.,* 9 Cir., 106 F.2d 530, 532; *Tyra v. Adler,* 8 Cir., 85 F.2d 548, 552; *Ideal Roller & Mfg. Co. v. Sutherland Paper Co.,* 6 Cir., 96 F.2d 675, 677.

The judgment of the court below is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed Feb. 7, 1955.

Paul P. O'Brien, Clerk.

Dick E. Stearns and The D. E. Stearns Company, a partnership composed of Dick E. Stearns and Ellen Belson Stearns, Appellants, vs. Tinker & Rasor, John Patrick Rasor and Leo H. Tinker, Appellees.	No. 13,634

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellants, and against the Appellees, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

IT IS FURTHER ORDERED and adjudged by this Court, that the Appellants recover against the Appellees for their costs herein expended and have execution therefor.

(Endorsed) Judgment Filed and Entered: February 7, 1955, PAUL P. O'BRIEN, Clerk.

United States Court of Appeals for the Ninth Circuit

Excerpt from Proceedings of Thursday, March 24, 1955.

Before: STEPHENS and CHAMBERS, Circuit Judges, and WALSH, District Judge.

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellees, filed March 15, 1955, and within time allowed therefor by rule of Court for a rehearing of the above cause be, and hereby is denied.

CERTIFICATE OF SERVICE

Pursuant to Rule 33, the above and foregoing Petition for Writ of Certiorari and Appendix thereto, have been served by depositing the same in a United States Post Office, with first class Air Mail postage prepaid, addressed to H. Calvin White, Esquire, Counsel of Record for Respondents, at his Post Office address, 611 Wilshire Boulevard, Los Angeles 17, California, this 10th day of June, 1955.

Edward B. Fogg

Henry Gifford Hardy

Attorneys for Petitioners

LIST OF AUTHORITIES

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IN THE

Supreme Court of the United States

October Term, 1955

No. 154

TINKER & RASOR, JOHN PATRICK RASOR
and LEO H. TINKER, *Petitioners,*

v.

DICK E. STEARNS and
THE D. E. STEARNS COMPANY, *Respondents*

RESPONDENTS' BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondents submit that the Petition for a Writ of Certiorari in the above cause should be denied for the following reasons:

1. The Petition viewed as a whole does not provide any reasons of the character contemplated by Rule 19(1) for the issuance of the Writ because:

a). The purported legal questions, upon analysis, are seen to be mere questions of fact requiring a review

of the evidence to determine the facts to which well established legal principles are to be applied; and

b). The principles of law governing this case are not in dispute and are well settled by prior decisions of this Court. The issues involve only the controversies of private parties involving a patent whose life is more than two-thirds spent.

2. The first and second "questions" presented by the Petition can best be considered together. They both fail to recognize that the Court of Appeals held that the findings of fact upon which the Court below predicated its opinion were "clearly erroneous" and that, therefore, the conclusion of the lower Court must fall. This clearly is not a question involving a refusal of the Appellate Court to follow a decision of this Court, but merely involves the consideration of the sufficiency of the evidence to sustain the questioned findings of fact. Further, the Appellate Court did actually follow and apply the test of invention laid down in the case of *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U.S. 147; 95 L. Ed. 162, though it did not cite it. "The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings" (Quote from the Court's decision, page 20 of the Appendix accompanying the Petition, in the last paragraph, which is followed by detailing these differences).

3. The contention of Petitioners that the Court of Appeals for the Ninth Circuit has over-ruled this Court's latest expression in the *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.* case (supra), 340 U.S. 147; 95 L. Ed. 162, is refuted by the record of several years standing of this particular Court of Appeals' stringent

application of that doctrine.[1] Equally, it is clear that the Court of Appeals did not ignore this doctrine in the instant case because the petition for rehearing was bottomed solely upon this contention and denied, as Petitioners admit at page 6, last paragraph, of the Petition.

4. Question 3 of the Writ is concerned with the Stevens patent and alleges a conflict with the ruling of the Sixth Circuit in *Allied Wheel Products v. Rude*, 206 F. 2d 754. The fallacy of this position is apparent because the decision in question actually cites the *Allied Wheel* case in support of its holding (top of page 20 of Appendix to the Petition) and the language actually closely follows that of the *Allied Wheel case*. In addition, the decision in question points out that even if the relation and similarity of elements be assumed, the function and purpose of these, in the reference patent, is entirely foreign to their function and purpose in the patent under consideration. (Page 20 of Petitioner's Appendix.) Clearly this is an application of the *A. & P.* case (supra) though it is not cited.

5. The fourth question is concerned with the consideration of another finding of fact which was found to be "clearly erroneous" because unsupported by any evidence. The whole question is predicated upon an unsupported assumption that there was an abandoned experiment by Mr. Mudd, who himself point blank denied having ever conducted any such experiment of any character (R. 793).

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[1] Berkeley Pump Co. v. Jacuzzi Bros., Inc., June 30, 1954, 214 F. 2d 785;
Hunter Douglas Corp. v. Lando Products, Inc., August 18, 1954, 215 F. 2d 372;
Kwikset Locks, Inc., v. Hillgren, February 3, 1954, 210 F. 2d 483;
Himes, et al., v. Chadwick, September 24, 1952, 199 F. 2d 100.

The opinion of the Appellate Court points out that the most that can be made of the Mudd testimony is that he "*believed*" that the invention would work if tried. Mr. Mudd's "beliefs" accompanied by no experiment at all is so obviously different from the "abandoned experiment" involved in the case of *Dow Chemical Co. v. Halliburton Oil Well Cementing Co.*, 324 U.S. 320, as to remove any question of this case being "overruled" in the Ninth Circuit as feared by Petitioners. The question of the effect of "abandoned experiments" just isn't involved. (At page 20 of the Appendix to the Petition, last paragraph, appears the pertinent portion of the opinion.)

6. In presenting their "Reasons for Granting The Writ", Petitioners, in discussing their questions 1 and 2, refer to the Court of Appeals decision as reversing the lower Court "on a rule of law" by ignoring the *A. & P.* case (supra) (Page 8 and also Page 9 of Petition). This, is an attempt to pose strictly factual questions as questions of law. However, the opinion of the Appellate Court clearly refutes this contention. It is clear from the opinion that the basis of the reversal was the clearly erroneous findings of fact upon which the lower Court relied. (See particularly portion of opinion at pages 20 and 21 of the Petitioners' Appendix.) A review by this Court can, therefore, only resolve itself into a thorough re-examination of the evidence for the purpose of again weighing these "findings of fact".

7. In an effort to present *fact* question 4 in the dress of a point of law, the Petition in its "Reasons for Granting the Writ" assumes Mr. Mudd to have experimented with one of the elements of the invention. (Page 10, paragraph 5, of Petition.) This assumption is a direct contradiction of the Appellate Court's statement in the opinion that " . . . the

fact is that they never used, or even tried to use" the element. (Page 18 of Petitioner's Appendix.) Thus, again, the only question is the accuracy of the Court of Appeals view of the evidence—a purely factual consideration.

Respectfully submitted,

JAMES B. SIMMS
3303 Montrose Boulevard
P. O. Box 6026
Houston 6, Texas
Attorney for Respondents

Of Counsel:

Ralph R. Browning
3303 Montrose Boulevard
P. O. Box 6026
Houston 6, Texas

H. Calvin White
611 Wilshire Boulevard
Los Angeles 17, California

Certificate

A copy of this brief has been mailed to each of the Attorneys for Petitioners, Edward B. Gregg and Henry Gifford Hardy, at 2610 Rusk Building, San Francisco 4, California, this ____ day of July, 1955.

Attorneys for Respondents

JUL 23 1955

HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 154

TINKER & RASOR, JOHN PATRICK RASOR and LEO H. TINKER,

Petitioners

vs.

DICK E. STEARNS and THE D. E. STEARNS COMPANY,

Respondents.

Petitioners' Reply Brief

EDWARD B. GREGG
HENRY GIFFORD HARDY
2610 Russ Building
San Francisco 4, California
Attorneys for Petitioners

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

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In the Supreme Court of the United States

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vs.

DICK E. STEARNS and THE D. E. STEARNS COMPANY,
Respondents.

Petitioners' Reply Brief

To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioners, Tinker & Rasor, John Patrick Rasor and Leo H. Tinker, respectfully submit the following brief in reply to Respondents' Brief opposing the Petition.

RESPONDENTS' FAILURE TO CONTEST PETITIONERS' SIXTH REASON FOR GRANTING THE WRIT IS TANTAMOUNT TO AN ADMISSION THAT THE PATENT IS OF GREAT IMPORTANCE IN THE INDUSTRY AND THAT RESPONDENTS ARE MISUSING IT.

The sixth reason for granting the writ, set forth at pages 11 and 12 of the Petition, is that the patent, if construed as sug-

gested by the Court of Appeals, is of great importance in the vast pipeline industry; that if the decision of the Court of Appeals is not reversed, Respondents may monopolize a vital and critical branch of that industry; and that Respondents are using the patent to monopolize unpatented materials.

Respondents' Brief makes no effort to refute this reason for granting the writ. They apparently agree with Petitioners.

RESPONDENTS' BRIEF ATTEMPTS, BUT FAILS TO ESTABLISH THAT THE COURT OF APPEALS DISAGREED WITH THE DISTRICT COURT AS TO FACTS RATHER THAN LAW.

Respondents state that the Court of Appeals applied the rule, although it did not cite the case, of *Great Atlantic and Pacific Tea Company v. Supermarket Equipment Corporation* (the *A & P Case*), 340 U.S. 147. In support of this contention Respondents' Brief quotes from the opinion of the Court of Appeals at 220 F.2d at page 57 (Appendix to Petition, page 20; R. 922-3) as follows:

> "The elements of the Stearns combination do functionally operate differently in the combination than they did in their old surroundings."

The key to the Court's thinking in this respect, however, lies in the sentence immediately following that quoted above, which reads as follows:

> "As we have determined, the spring electrode *for the first time in its use in holiday detectors* is rolled, instead of being dragged." (Emphasis added.)

Thus the Court of Appeals, perforce admitting that the spring electrode (the vital element of the combination) was not new, and that such an element had been rolled previously, nevertheless found invention because that element had not been similarly used previously *in the very device patented or in a closely related art.*

Finding No. 15 (R. 29), which was one of the crucial findings of fact reversed by the Court of Appeals (R. 922; Appendix page 19), reads as follows:

> "(15). The practical advantages of a rolling coiled spring electrode or electrical contactor were described in a prior U. S. Patent, Stevens No. 951,347, granted March 8, 1910 (Def.'s Exh. O) in connection with an electric snap switch; and the said Stevens patent clearly teaches that a coiled spring could be made to rotate or roll along a cylinder and used as an electrical connection."

The Court of Appeals did not disagree with this finding *as a statement of fact.* The Court of Appeals disagreed with the District Court *as to the legal significance of the fact.* As stated by the Court of Appeals (R. 922; Appendix, page 19):

> "It is our view that the Stevens patent is in an art so remote and nonanalogous from that of the Stearns patent that it should not have been considered by the court below upon the question of invention and, consequently, that the court below should not have made the finding which it did upon the basis of the evidence regarding the Stevens patent."

It is abundantly clear that the Court of Appeals did not disagree with the District Court as to the facts concerned, i.e., as to the evidence, but only as to the legal significance of that evidence.

It is clear that the Court of Appeals held, with regard to the Stevens patent and Finding of Fact No. 15, that as a matter of law the Stevens patent should not be considered because it related to nonanalogous art.

In our Petition at pages 9 and 10, we have pointed out that nonanalogous prior art was in fact considered by this Court in the *A & P Case.* In footnote 5 on page 10 our Petition points out that the Court of Appeals for the Sixth Circuit held that nonanalogous prior art must be considered.

RESPONDENTS IN EFFECT ADMIT THAT THE COURT OF APPEALS IN THIS CASE DEPARTED FROM ITS PRECEDENT OF CITING AND APPLYING THE T & P CASE.

Throughout our Petition, we stress the anomalous circumstances that the *A & P Case* is controlling in the case at bar, but that the Court of Appeals did not even cite it. Respondents admit that the *A & P Case* is controlling and that the Court of Appeals did not cite it.

Respondents argue, however, that the Court of Appeals must have considered and applied the *A & P Case* because of "the record of several years standing of this particular Court of Appeals' stringent application of that doctrine", citing four Ninth Circuit cases in which the *A & P Case* was applied (Respondents' Brief, pages 2 and 3).

We contend that the record clearly shows a determination on the part of the Court of Appeals, in the case at bar, to ignore the *A & P Case*. With respect to the test of invention (operation "in a more facile and efficient way", Appendix, page 20; R. 923) and the relevance of nonanalogous prior art, the Court of Appeals stated rules of law which, to say the least, are highly questionable in the light of the *A & P Case*. Under the circumstances, any court which was aware of the *A & P Case* and was willing to grapple with it, would have said some word concerning it in its opinion. And in ruling on a petition for rehearing directly raising the question, such court would have made an attempt to reconcile its decision with the *A & P Case*.

The Court of Appeals for the Ninth Circuit consists of nine judges, only three of whom sit in any given case, except in the occasional instances where the Court sits *en banc*. Rule 23 of that Court requires that a petition for rehearing must be presented to the same judges who heard and decided the case in the first instance. Grievous errors of law, such as committed in this case, must, therefore, be brought to the attention, not of the Court

as a whole nor to the Chief Judge thereof (Judge Denman), but to the same three judges who committed the error.

In each of the four Ninth Circuit cases cited in Respondents' Brief, a different bench sat and decided the case than sat in the case at bar. It is indeed a travesty of justice if the outcome of a case based upon clear principles of law, must depend upon a lottery, namely, the particular selection of judges sitting in the case.

The writ should be granted because this case raises a serious problem of fair and equal administration of justice.

Respectfully submitted,

EDWARD B. GREGG
HENRY GIFFORD HARDY
Attorneys for Petitioners

CERTIFICATE OF SERVICE

Pursuant to Rule 33, the above and foregoing Petitioners' Reply Brief has been served by depositing the same in a United States Post Office, with first class Air Mail postage prepaid, addressed to James B. Simms, Esquire, Attorney for Respondents, at his Post Office address, 3303 Montrose Boulevard, Houston 6, Texas, this 26th day of July, 1955.

EDWARD B. GREGG
HENRY GIFFORD HARDY
Attorneys for Petitioners